

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 1, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP160

Cir. Ct. No. 2000CV2326

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**JOHN C. BUELLESBACH AND
MELANIE L. BUELLESBACH,**

PLAINTIFFS-APPELLANTS,

v.

MARK W. ROOB,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: FRANCIS T. WASIELEWSKI, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 WEDEMEYER, P.J. John C. and Melanie L. Buellesbach appeal *pro se* from a judgment entered in their favor against Mark W. Roob. The Buellesbachs challenge only the trial court's calculation of damages, claiming that

the trial court failed to: (1) properly double all of their pecuniary loss as required by statute; (2) award preverdict interest on liquidated damages; and (3) award punitive damages. Roob failed to file a response brief. Because Roob failed to respond to any of the Buellesbachs' claimed errors, he tacitly concedes that the trial court erred. Accordingly, we reverse the trial court's judgment with respect to damages and direct the trial court on remand to enter an amended judgment consistent with this opinion.

BACKGROUND

¶2 This case arises out of a contract wherein the Buellesbachs agreed to have Roob photograph their wedding on August 10, 1997. The Buellesbachs paid Roob \$1795, which included Roob's services, eighty five-by-seven-inch photographs and a "design session" to select those photographs. At the design session on August 27, 1997, Roob presented the Buellesbachs with an album containing many more than the eighty pictures required by the contract and demanded additional money. When the Buellesbachs objected, Roob told them that if they wanted only the eighty pictures, they would have to pay higher *à la carte* prices instead of the contracted price of \$1795. The Buellesbachs refused to purchase the proposed album and left the design session.

¶3 Subsequently, Mrs. Buellesbach's attempts to reach any agreement with Roob failed. Roob stated that the Buellesbachs must purchase the album presented at the design session or pay *à la carte* prices. The Buellesbachs then contacted the Department of Agriculture, Trade and Consumer Protection (Department of ATCP) to file a complaint against Roob. In response, Roob told Mr. Buellesbach that they might never see their wedding pictures. When Mr. Buellesbach learned that other couples who had hired Roob to photograph their

weddings had similar problems, Buellesbach contacted the Milwaukee County District Attorney. When Roob received a letter from the district attorney, he called Mrs. Buellesbach at work and told her that he was going to hire an attorney, and that if the Buellesbachs ever wanted to see their wedding pictures, they would have to pay for the cost of his defense, including his attorney's fees. Mrs. Buellesbach again asked if she could just select the photographs they wanted and Roob refused.

¶4 After investigating the Buellesbachs' complaint, the Department of ATCP concluded that Roob had violated its rules governing Home Solicitation Selling, and referred the matter to the Waukesha County District Attorney for prosecution under WIS. STAT. § 100.20.

¶5 On January 12, 2000, following a two-day trial, a jury found Roob guilty of violating WIS. ADMIN. CODE § ATCP 127. Roob appealed his conviction and this court affirmed.

¶6 On January 17, 2000, Roob was charged with eight counts of felony fraud based on his wedding photography practices—four counts under WIS. STAT. § 100.18 (1999-2000)¹ (fraudulent representations), and four counts under WIS. STAT. § 943.39 (fraudulent writings). The charges related to four other couples who had contracted with Roob for wedding photography—Matthew and Elizabeth Hackett, Duane and Laura Reusch, Neal and Anne Grintjes, and Scott and Cindy Biesterveld. A jury found Roob guilty on all eight counts. Roob appealed those convictions and this court affirmed.

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶7 On March 20, 2000, the Buellesbachs filed this action against Roob, alleging breach of contract, intentional misrepresentation, unfair trade practices and violations under the ATCP and the Wisconsin Organized Crime Control Act (WOCCA), WIS. STAT. § 946.83(3). The Buellesbachs filed a motion seeking summary judgment, which was granted on the contract and consumer protection claims initially. After Roob's criminal convictions were affirmed on appeal, summary judgment was also granted on the WOCCA claims. The trial court then conducted a bench trial on damages only. At the conclusion of the trial, the trial court awarded the Buellesbachs damages. The trial court found that the Buellesbachs suffered a pecuniary loss consisting of: \$1795 (contract price), \$720 (lost wages), \$869.40 (mileage), \$160 (parking), \$640 (copying) and \$82 (postage and telephone), for a total of \$4276.40. It then doubled the pecuniary damage amount pursuant to WIS. STAT. § 100.20(5) to reach the sum of \$8552.80, less the original \$1795, for a final sum of \$6757.80.

¶8 The trial court proceeded to address the issue of punitive damages, finding that the conduct here justified a punitive damage award. However, just prior to fixing the amount of the award, the trial court ruled that because statutory double damages serve as a punishment, it could not also enter a separate punitive damage award. The trial court also ordered Roob to pay the Buellesbachs' attorney's fees and statutory costs in the amount of \$10,917.55. Subsequent to the bench trial, the trial court amended the damage award. First, it awarded prejudgment interest in the amount of \$299.20, but it recalculated the doubled pecuniary damage award, reasoning that "pecuniary loss" included only the \$1795, and not the additional costs incurred by the Buellesbachs. Ultimately, the final judgment in this case ordered Roob to pay the sum of \$15,493.35, plus allowable

costs incurred subsequent to August 16, 2004. The Buellesbachs challenge certain portions of the damage award.

DISCUSSION

¶9 The Buellesbachs seek reversal on three issues related to the damage award. First, they contend that the trial court erred in doubling only the \$1795 instead of their total *pecuniary loss* incurred in this case. Second, they contend the trial court should have awarded preverdict interest on the additional \$1795 they were entitled to. Third, they contend that the trial court should have awarded punitive damages.

¶10 Despite orders from this court, Roob failed to file a response brief. Generally, we reverse a judgment or an order when the respondent fails to file a brief because failure to file a respondent's brief operates as a tacit concession that the trial court erred. *See State v. R.R.R.*, 166 Wis. 2d 306, 311, 479 N.W.2d 237 (Ct. App. 1991). We conclude that reversal of the trial court judgment is appropriate based on this general principle.

A. Doubling of Actual Pecuniary Loss.

¶11 The Buellesbachs argue in their brief that “pecuniary loss” includes their actual monetary loss as a result of Roob’s misconduct. They argue that the items that constitute their pecuniary loss, such as lost wages, mileage, etc., which the trial court initially included in the pecuniary loss calculation, should not have been later removed. They argue that these items were not, and cannot be, included in the “costs” portion of the judgment and therefore should be included as a pecuniary loss to them. Roob failed to respond to this argument. Accordingly, we direct the trial court to amend the judgment to include the Buellesbachs’ entire

pecuniary loss in the doubling equation, as it did initially. This would set the doubled pecuniary loss sum at \$6757.80.

B. Preverdict Interest.

¶12 The Buellesbachs argue that although the trial court subsequently allowed preverdict interest on the \$1795, it should have awarded preverdict interest on the additional \$1795, as this was a liquidable sum, clearly determinable and fixed by statute. Roob failed to respond to this argument. Accordingly, we direct the trial court to amend the judgment to include preverdict interest on the additional \$1795, in the amount of \$299.20.

C. Punitive Damages.

¶13 The Buellesbachs argue that the trial court should have awarded punitive damages in addition to the double statutory damages. They point out that, although in general, Wisconsin does not allow for both statutory multiple damages and common law punitive damages for the same conduct, *see John Mohr & Sons, Inc. v. Jahnke*, 55 Wis. 2d 402, 409-12, 198 N.W.2d 363 (1972), here the specific statutory remedy under WOCCA permits both awards. *See* WIS. STAT. § 946.87(4) (“Any person who is injured by reason of any violation of [this statute] has a cause of action for 2 times the actual damages sustained and, when appropriate, punitive damages.”).

¶14 Here, the trial court found that the standard necessary for an award of punitive damages was satisfied:

I conclude first of all that the actions taken here by Mr. Roob with respect to the a la carte pictures was almost or close to, if not, a bait and switch situation where he contracted with them for one thing and tried to get them to pay for something else at a different price.

The question then becomes what are appropriate punitive damages here. Punitive damages should be awarded in the sum such as will serve as a punishment or intent to deter such wrongful conduct in the future.

....

[T]here was a crude calculation by Mr. Roob that he could capitalize on the vulnerability of the Buellesbaches [sic] and that he could get something here. He looked on this [] as a financial opportunity. He was already bound to them in a contract. He was willing to throw that contract to the side, disregard the rights of the Buellesbaches [sic] under that contract in an attempt to enhance his own financial gain from this transaction.

What happened as a result? Well, the Buellesbaches [sic] never really did have pictures of that wedding around the time of the wedding. It's the first couple years when you like to have your friends over and go over and review the events of that day Well, the Buellesbaches [sic] didn't have that opportunity. They didn't have the album with the pictures. They were deprived of that because of the actions of Mr. Roob.

....

It is clear that the plaintiffs were deprived of something that most married couples treasure and look forward to having and sharing together and enjoying together, and that is the pictorial record of their big day. The plaintiffs were damaged by not having that record.

....

The purpose[] of punitive damages is to deter future wrongful conduct. Punitive damages are a judicial slap on the wrist, a financial slap on the wrist saying what you did should never have been done and that you deliberately disregarded the rights of another person.

¶15 The trial court then engaged in an analysis about the ratio of compensatory damages to punitive damages. After that, the trial court stopped short of determining a punitive sum because it felt that if the damages had been doubled by statute, it was precluded from awarding punitive damages. The trial

court did state, however, that “absent the statute, I would be inclined to consider something.”

¶16 Again, Roob failed to file a respondent’s brief contesting the Buellesbachs’ position that under WOCCA, this was an appropriate case to enter a punitive award. With Roob’s tacit concession, we agree with the Buellesbachs that the trial court could have, and should have, awarded punitive damages. Roob’s conduct was willful and outrageous. His victims suffered actual damages and he has the ability to pay. He should be punished for his conduct.²

¶17 The Buellesbachs request that we exercise our authority to set a punitive damage award, pointing out that the fact-finder, here the trial court, found a basis for the award, but simply felt it was legally prohibited from actually making the award. They also point to case law suggesting that this court has the authority to set reasonable punitive damages. *See Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 196 Wis. 2d 578, 611-12, 539 N.W.2d 111 (Ct. App. 1995), *aff’d in part; rev’d in part on other grounds* by 206 Wis. 2d 158, 557 N.W.2d 67 (1996).

¶18 We conclude that, because this case involves a unique set of circumstances and no additional factual development is necessary, it is appropriate for us to determine a reasonable sum for punitive damages. We also conclude that given the extended length of proceedings relating to Roob’s misconduct with the

² We note that Roob was prosecuted criminally and convicted for substantially similar conduct with four other couples. *See State v. Roob*, No. 03-0982-CR, unpublished slip op. (WI App May 18, 2004). In addition, one of those couples sued Roob in civil court and was awarded both double statutory damages and \$15,000 in punitive damages, which was affirmed by this court. *See Biesterveld v. Roob*, No. 00-2721, unpublished slip op. (WI App Sept. 13, 2001).

Buellesbachs, they should not be forced to undergo additional proceedings related to this issue. They were married in August 1997, and filed this action in March 2000. It is now August 2006.

¶19 Based on the information provided in the record and set forth in the Buellesbachs' brief, we conclude that an appropriate sum for punitive damages is \$15,000. As noted, we affirmed the Biestervelds' case, wherein the Roob contract was for \$1980, and \$15,000 in punitive damages were awarded. *See Biesterveld v. Roob*, No. 00-2721, unpublished slip op. (WI App Sept. 13, 2001). Accordingly, we direct the trial court to amend the judgment in this matter to order Roob to pay the Buellesbachs \$15,000 in punitive damages.

CONCLUSION

¶20 In sum, we direct the trial court to: enter an amended order, doubling the entire pecuniary loss suffered by the Buellesbachs for a total doubled pecuniary loss of \$6757.80; award \$299.20 in additional preverdict interest; and award \$15,000 in punitive damages.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.

